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No. 391

In the Supreme Court of the United States

OCTOBER TERM, 1970

PHILLIP SANTORO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a trial by jury in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to transport stolen automobiles in interstate commerce and of substantive offenses involving their transportation and sale, in violation of 18 U.S.C. 371, 2312 and 2313. He was sentenced to fifteen years' imprisonment. The court of appeals affirmed. 388 F. 2d 113. This Court (392 U.S. 301) vacated the judgment and remanded the case for reconsideration in light of *Bruton* v. *United States*, 391 U.S. 123.

The court of appeals reaffirmed the conviction on October 31, 1968. 402 F. 2d 920. In May 1970, petitioner sought leave to file a petition for rehearing out of time. Such leave was denied on June 15, 1970. The petition for a writ of certiorari, which was filed July 14, 1970, is substantially out of time under Rule 22(2), and is in any event without merit.

1. The evidence showed that from April through July 1963 six late model Cadillac convertibles were stolen in the Chicago area (3 R. 129, 131, 152, 191, 236, 246),[1] and that during this period petitioner and his girl friend, co-defendant Haynes, sold them in California (4 R. 336-338, 345-346, 356, 370, 381, 417). The vehicle identification numbers on all the six vehicles had been altered prior to sale (4 R. 288-301). Petitioner drove some and co-defendants Coduto and LaMagna drove the other vehicles from Illinois to California (4 R. 563-566, 2 R. 877).

As petitioner completed the last two sales in Stockton, California, he and the male co-defendants were apprehended. Mrs. Haynes was taken into custody shortly thereafter (4 R. 417, 508). All four were questioned by F.B.I. agents after appropriate warning of their rights but none admitted they knew the vehicles had been stolen (4 R. 448, 461, 505, 509).

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[1] "R." preceded by the volume number refers to the six-volume court of appeals record presently on file with the Clerk of this Court *sub nom. Santoro* v. *United States*, No. 1219, O.T., 1967. Volumes 2-5 contain the trial transcript, consecutively paginated, but with volume 3 being the first volume. The final transcript volume is volume 2, which in pagination follows volume 5.

Petitioner first claimed to be a Ralph Sieben[2] and showed credit cards and a driver's license issued in that name (4 R. 496). He later gave his correct name and explained that Sieben had engaged him to drive repossessed Cadillacs from Illinois to California for a set fee, and that he had hired his male co-defendants to help (4 R. 496-505). When first questioned, the male co-defendants referred to petitioner as "Ralph" or as "Sieben" (4 R. 447, 460), but they later stated they knew him by his own name (4 R. 447, 472). Mrs. Haynes did not acknowledge knowing petitioner but acknowledged that she knew a businessman named Cassar,[3] with whom she had lived briefly in California and at whose request she had sold some Cadillacs (4 R. 508-511).

At trial, all defendants took the stand but none admitted knowing the vehicles had been stolen (4 R. 579, 5 R. 623, 678, 798). Petitioner testified he had used the names, Cassar and Sieben, so he would not be required to get a dealer's license to sell used cars in California (5 R. 736). He claimed to have acted for a man who identified himself to petitioner initially only as "Ralph," but later as Ralph Sieben.[4] Sie-

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[2] Sieben was the victim of a June 1963 theft. At the time his vehicle was stolen two credit cards were in the vehicle. These were the cards petitioner used to claim his identity as Sieben. The driver's license in Sieben's name which petitioner had filled out was fictitious (3 R. 152-154, 5 R. 776-777, 786).

[3] This was one of the names petitioner had used in selling the vehicles (4 R. 346; 5 R. 736).

[4] Petitioner testified this person was not the Ralph Sieben, the victim of one of the thefts, who testified at trial (2 R. 849).

ben, petitioner said, contracted with him in Illinois to deliver and sell repossessed Cadillacs in California for a fee of $500 per vehicle. Petitioner stated that he gave the remaining money to his principal in Illinois after each sale (5 R. 710, 718, 765, 772).

Mrs. Haynes testified she could not remember what she had told the F.B.I. agent in 1963 when she had been taken into custody, but explained that she made sales upon petitioner's request (5 R. 637, 651, 662). Petitioner acknowledged that he had brought all six vehicles to California and that on occasion he had used Mrs. Haynes to sell some (5 R. 722, 755, 2 R. 877). Co-defendant Coduto stated that he had never used the names, "Ralph" or "Sieben," to refer to petitioner in his pretrial statements (5 R. 625-626), and co-defendant LaMagna testified that it was the F.B.I. agent, not he, who kept referring to petitioner as Ralph Sieben during the pretrial questioning (5 R. 573, 582, 595, 598, 600, 602, 604).

2. The court of appeals on remand held that *Bruton* did not apply and that petitioner's right of confrontation had not been violated because his co-defendants testified. Petitioner contends, however, that because they were represented by the same retained counsel as he, fully effective cross-examination of the co-defendants was not possible. In the context of petitioner's defense, joint representation did not result in prejudice. He admitted transportation and sale, but claimed lack of knowledge of theft. He also ad-

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[5] In his direct testimony, Coduto related that petitioner had told him that the cars belonged to a Ralph Sieben and that petitioner was selling them for Sieben (5 R. 617-620).

mitted association with co-defendants in the enterprise. Their defense was essentially the same as his. Examination of them to attempt to remove adverse inferences from their prior statements by eliciting denials that they had referred to him as Ralph or Sieben was not curtailed by counsel's obligations to them as clients.

The evidence of petitioner's guilt was overwhelming in any event. He was apprehended in California after he sold two cars recently stolen in Illinois. He had credit cards and a spurious driver's license made out in the name of the owner of one car, whom he claimed to be. Accordingly, any error in the admission of the co-defendants' pretrial statements, or lack of trial efforts to get the co-defendants to exculpate petitioner any further than they did, was harmless. See *Harrington* v. *California*, 395 U.S. 250, 254; *Wapnick* v. *United States*, 406 F. 2d 741, 742 (C.A. 2).[6]

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[6] Petitioner suggests (Pet. 8-12) that the decision below is in conflict with those of other courts of appeals. Of the cases he cites, however, the only one in which a question of joint representation was raised is *Baker* v. *Wainwright*, 422 F.2d 145 (C.A. 5). The court there held that in the circumstances of that case, the effect of *Bruton* was to create a conflict of interest among the co-defendants, so that prejudice from their representation by the same counsel was apparent without need for a specific showing. There was, by contrast, no prejudice to the defendant from joint representation in the present case, both because the defenses of the co-defendants were consistent and because there was other overwhelming evidence of guilt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

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